A PROPOSAL FOR REFORM OF OCCUPIERS' LIABILITY IN NOVA SCOTIA

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PROLOGUE: DISCUSSION PAPERS AND LAW REFORM

During its Spring 1990 session the Nova Scotia Legislature enacted legislation to create an independent Law Reform Commission. Many people will assume that the job of law reform will now pass from departments of government to the Commission. This should not be the case. The Attorney General's Department has a role in law reform that cannot be abdicated. For example, during the same session that saw the Law Reform Commission created, the Attorney General also introduced legislation regarding freedom of information, an independent prosecution service, investor protection and Charter compliant search and seizure. The Court Structure Task Force was established to review the organization of the courts in the Province and recommend improvements that will make them more accessible and efficient. These initiatives are all examples of law reform.

The Law Reform Commission should be seen as augmenting a healthy internal reform process.

However, a Law Reform Commission enjoys a significant advantage over government departments. Its proposals are recognized as independent of government. They are intended to be freely circulated and discussed. Departments, on the other hand, are closely identified in the public mind with the Government and a particular Minister. Departments of government are sometimes reluctant to circulate positions and encourage discussion for a number of reasons, not the least of which is a fear of embroiling the Minister in controversy.

This paper is intended to encourage discussion, a mild form of controversy. It takes a position and gives everyone a chance to say what is wrong with it. This is not the safest way to solicit comments but it is probably the best.

None the less it is important to understand what this paper represents and what it doesn't represent. This paper does not purport to represent the views of the Government or any member of the Government. The paper does not represent draft legislation and there is

no commitment that legislation in any form will be introduced. The views were drawn up in the Policy Branch of the Attorney General's Department and are expressed in this paper for the purpose of assisting in the development of a legal policy position to place before Government so that it can make an informed decision, if it chooses to.

In short, the views are a preliminary look at the balance between the interests of those in control of land and those who visit it.

If this discussion paper proves a successful method of gathering comments it is hoped that similar, modest discussion papers can be issued from time to time on other topics of public interest.

Comments on this paper should be addressed, no later than January 11, 1991, to:

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A DISCUSSION PAPER ON OCCUPIERS' LIABILITY

PART 1: THE LEGAL PRINCIPLES

Introduction

The common law of occupiers' liability is the branch of negligence law that governs the duties people in control of premises owe visitors to those premises. The extent of the occupiers' duty depends on whether the visitor is a trespasser, licensee or invitee. These rigid categories of visitor have created confusion and unpredictability in the law. Critics deplore them as remnants of an "overzealous preoccupation with the sanctity of real property rights, even over that of human life."[1]

The modern story of occupiers' liability in Great Britain, the United States, Australia, New Zealand, and many provinces of Canada excluding Nova Scotia, is one of legislative reform aimed at striking a fair and understandable duty of care.

Development of the common law of occupiers' liability

Originally, the "occupier" (person in control) of premises, did not owe a duty of care to visitors unless express or implicit permission to enter could be shown. If a visitor could be classed as a "trespasser", someone who entered without permission regardless of whether the occupier was aware of the entry or not, an occupier could be held liable only for harm intentionally or recklessly caused. The notion of "recklessness" received a very restricted meaning and was closer to the concept of "wilful blindness" than of negligence.

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[1] Report on Occupiers' Liability, Ontario Law Reform Commission, Ontario Department of Justice, 1972, page 6

Eventually higher standards of care developed which varied according to the status of the visitor. Today, at common law there are three categories of visitor. The **trespasser** is still owed very little care. The **invitee**, someone to whom express permission to enter has been given and whose presence conferred a material benefit upon the occupier, is owed the highest standard in the form of a duty to protect the invitee from dangers of which the occupier knows or should know. **Licensees**, those with implied permission to be present, are owed a duty of care with respect to traps of which the occupier knows.

Despite the clarity of these categories in the abstract, in practice they produce confusion, uncertainty, and arbitrariness:

> A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him it seems rather strange that your duty towards him should be different when he comes up to your door from what it is when he goes away. What is his position when you discuss business with him and it comes to nothing? No confident answer can be given to these questions. Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees.[2]

This passage reflects a judge's perspective (Lord Denning, one of the most innovative legal minds of this Century) so it is not difficult to see why the law is confusing to lawyers and laypeople.

But the confusion doesn't stop with the categories of visitor. Arbitrary distinctions seem to breed arbitrary distinctions. The categories of entrants are modified as courts struggle to soften the impact of the arbitrariness. The categories become more difficult to distinguish and there is little consistency among the cases. Where the damage or injury results from a "condition" of the premises an occupier is more likely to avoid liability than if the harm is

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[2] Dunster v Abbott [1953] 2 All E.R. (C.A.) 1572, 1574

the result of an "activity" on the premises. Distinctions are made between "unusual dangers" and "traps".

The defects of this system are best summed up in the 1972 Ontario Law Reform Commission report: "In this field, perhaps more than any other, legal fictions have developed to the extent that the outcome of any particular case now seems fortuitous."[3]

The English and Scottish Experiences

Remedial legislation was first enacted in England (1957) and Scotland (1960). Both Acts imposed a common standard of care upon occupiers toward visitors formerly known as "invitees" and "licensees". The Scottish Act, however also extended a common standard of care to trespassers. In England trespassers were initially left to their common law remedies.

A Scottish case demonstrates a common standard of reasonable care to all entrants does not mean that all entrants are accorded the same rights. In the case of Titchener v British Railways Board [1983] 3 All ER 770 H. of L., a sixteen year old girl trespassing on railway property was seriously injured when struck by a train, which was found to be operating in a prudent manner.

Despite the dilapidated condition of a fence along the line, the Court considered the age and intelligence of the girl, her knowledge of the railway line and the dangers it posed, her experience in crossing the line, as well as the fact that a proper fence would not have deterred her from entering on the line. The Court concluded that the railway did not owe the plaintiff a duty to keep the fence in a better state of repair, despite the fact that the line passed through a heavily populated section of Glasgow, because a better fence would not have deterred the plaintiff and so the condition of the fence did not "cause" the accident. A person on the line with permission would certainly have fared better.

Ironically the duty owed trespassers reached a higher standard in England, when the common law was drastically rewritten by the House of Lords in Herrington v British Railways [1972] A.C. 877 and a standard of "common humanity" applied.

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[3] supra note 1 at page 6

In Herrington, a 6 year old boy playing in a public park strayed into an adjacent electrified rail line and was severely burnt. The evidence showed that: the fence had been broken at the time of the accident and for some time prior; children had been straying onto the line in the area of the accident; the railway administrator had been advised of the presence of children on the line; and that the railway had taken no steps to inspect or repair the fence. The court ruled that, given the location of the line adjacent to a playground and the likelihood of children trespassing as well as the extreme danger that the line presented, the occupier owed a duty of "common humanity" to protect entrants from danger.

The judgement, though unanimous in the result, contained decisions of each of the five judges which differed in their reasons. The English Law Commission was asked to clarify the law relating to trespassers. Following a study paper and report, legislation was passed in England in 1984 which applied to all visitors, including trespassers, and required occupiers to "take such care as is reasonable in all the circumstances of the case to see that he (the entrant) does not suffer injury on the premises by reason of the danger concerned."[4]

The statute places certain conditions upon this duty: (1) first the occupier must be aware or have reasonable grounds to believe a danger exists; (2) he must know or have reasonable grounds to believe that the entrant is or may enter the vicinity of the danger; and (3) the danger must be one which the occupier may "reasonably be expected to offer protection."[5] The occupier may discharge this duty by taking such steps as are reasonable to warn of the danger or to discourage persons from incurring the risk.[6]

In comparing the Scottish and English experiences with "trespassers" it is significant to note that, although starting from opposite positions, both now impose a duty on occupiers

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[4] Occupiers' Liability Act 1984, c. 3, s. 1 (4) (England)

[5] ibid s. 1 (3) (a)

[6] ibid s. 1 (5)

of reasonable care toward trespassers. As has been seen, however, this does not mean that all visitors are treated alike. In England legislation has defined the circumstances where a duty will arise. In Scotland case law has achieved a similar objective. In addition the common law considerations of foreseeability (did the occupier know or have reasonable grounds to believe that the entrant was in the vicinity of the danger), causation (did the occupier's breach of the duty cause the injury, ie: the broken fence as seen in Titchener) and remoteness (was the injury beyond reasonable contemplation) all serve to limit the liability of an occupier of land.

The Canadian Experience

In Canada, occupiers' liability is under provincial jurisdiction. As a result of dissatisfaction with the common law, comprehensive legislation has been enacted in Alberta (1973), British Columbia (1979), Manitoba (1983), Ontario (1984) and Prince Edward Island (1984). Each of these provinces has imposed a duty of reasonable care on occupiers' for damage or injury to licensees or invitees. Some have extended this to trespassers to one degree or another.

In Alberta, with the exception of child trespassers, the common law with respect to trespassers was preserved making occupiers liable for intentional or reckless conduct. In British Columbia and Manitoba the categories of entrants were completely abolished and a duty of care common to all established.

Ontario, despite a Law Reform Commission Report which recommended legislation encompassing "all types of persons entering lands and premises regardless of their former categories", adopted a restrictive approach, effectively returning to the former standard of intentional or reckless conduct with regard not only to trespassers but also recreational users of certain defined categories of land and premises. Prince Edward Island has substantially duplicated the Ontario legislation.

The Development of the Law in Nova Scotia

The common law still governs the legal relationship between occupiers and visitors in most circumstances in Nova Scotia. In 1976 the Nova Scotia Law Reform Advisory Commission recommended a common duty of care be legislated for all visitors with the exception of "intruders" (those engaged in criminal activity on the premises).

However, no comprehensive legislation followed. Instead legislation has dealt with small aspects of the problem. In 1977 The Occupiers of Land Liability Act (R.S.N.S. 1989, c. 322) was passed. It differed markedly from the Commission's recommendations and can be quoted here in full:

> **1 An occupier of land owes no duty of care towards a person who is driving or riding on a motorized vehicle or being towed by a motorized vehicle upon the land and who is a trespasser or licensee except the duty to not create a danger with the deliberate intent of doing harm or damage to the trespasser or licensee.**[7]

The Trails Act (R.S.N.S. 1989, c. 476) establishes that where land has been designated as a trail, the owner or occupier of land owes no duty of care towards persons using the land and is liable for injury or damage only to the extent that he or she acts with the "deliberate intent of doing harm or damage to the person or the person's property". (Trails Act supra. s. 18 (4)).

As a result, in Nova Scotia there are six separate categories of entrant, each owed a different standard of care.

1. Invitee: occupier liable for dangers of which he or she knew or should have known.
2. Licensee: occupier liable for unusual risks or traps of which he or she knows.

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[7] R.S.N.S. 1989, c. 322

3. Trespasser: occupiers either owe a duty of "common humanity" following Veniot v Kerr Addison Mines [1975] 2 S.C.R. 311 or are liable for intentional harm/reckless disregard following Addie v Dumbreck [1929] A.C. 358 H of L. It is difficult to say which.
4. Trespassers and licensees riding or being towed by a motorized vehicle: occupier liable for intent to cause harm or reckless disregard. (Occupiers' of Land Liability Act R.S.N.S. 1989, c.322)
5. Users of trails: occupier liable only for deliberate intent to cause harm. (Trails Act R.S.N.S. 1989, c. 476)
6. Contractual entrants: liability governed by contract, unless the courts override terms they consider unreasonable.

Weaknesses of the Present Law in Nova Scotia which Justify Legislative Change

This confusion of standards is the outcome of a system which rests on fixed categories The tendency, in such a system, is to create more categories in order to deal with the multiplicity of problems which arise in everyday life.

That's not the only problem. The law, as it exists in Nova Scotia, does not apply in other jurisdictions. Decisions of their courts are of little benefit to us because they are based on legislation we don't have. Nova Scotia may find itself out of the mainstream in this field and the only jurisdiction where the archaic categories of invitee, licensee and trespasser still exist.

The fact that most other jurisdictions in Canada have legislated a reasonable standard of care is not a reason for Nova Scotia to do the same. But it does demonstrate the utility of such an approach in addressing the problems of the common law.

The common law of occupiers' liability is needlessly complex. Complex, because of the unduly rigid categories of visitors. Needless, because the categories have no intrinsic merit.

The categories of visitors are but a crude attempt at measuring "foreseeability". Foreseeability is well understood in every other field of negligence law. It simply means:

could the injury to this person have been foreseen by a reasonable person. So, for instance the standard of care owed a trespasser would be lower than that owed an invitee because the presence of a trespasser is less likely, not because of an arcane legal exercise of fitting him into a category.

The confusion the categories create is best exemplified by the treatment of people who are, strictly speaking, trespassers but whose presence was foreseeable. Prior to the Herrington decision the harshness of the common law standard of care (intentional harm/reckless disregard) was often avoided by recourse to a number of strategies. The most common was to imply a license. Thus in Nova Scotia an occupier who made no effort to exclude the public from his wharf was deemed to have granted an implied license to a young boy who was seriously injured while riding his bike on the wharf at night.[8]

Another technique used by the courts has been to distinguish between a "condition" of the premises (where the rules of occupiers' liability apply) and "activities" on the premises (to which the negligence rules apply). Courts have also sought to characterise the defendant as a non "occupier" in order to apply the reasonable duty of care of ordinary tort law.[9]

The Supreme Court of Canada (in Veniot v Kerr Addison Mines [1975], 2 S.C.R. 311) has not helped much. In that case a snowmobiler was seriously injured when he drove into a chain strung across a private road at night.

The court held that the snowmobiler had an "implied" license to enter the private road, despite the fact that the occupier had no knowledge of his presence, and did not want him there. The evidence cited in favour of the implication of a license were that the private road was connected to a public road, both roads were plowed, there were no signs

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[8] McLeod v Bridge Park Ltd (1979), 35 NSR 2d 169 (S.C.T.D.)

[9] Hertz, Michael Terry, N.S.L.R. Advisory Commission, "Occupiers' Liability Law: A Study Paper", (1976) at p. 6.

to indicate that the road was private, and the occupant's regional managers had seen snowmobile tracks on the road where the chain was located.

Unfortunately while concurring in the result, the differing decisions within the majority of judges who spoke to the issue of duty of care leave one in doubt as to the ultimate significance of this case. However, regardless of whether the standard of "common humanity" was relied on specifically (only Dickson, J. did so), the reasoning of the majority of judges in the case points to the growing importance of foreseeability (instead of categorization) as the test for whether a duty of care is owed. The "foreseeability" factors relied on were:

1. the gravity and likelihood of probable injury;
2. the character of the intrusion;
3. the nature of the place where the trespass occurred;
4. the knowledge which the occupier had or ought to have had of the likelihood of trespassers being present.

This approach has been considered by some Nova Scotia Courts[10] but it seems the majority of courts have felt themselves bound by the old rules of occupiers' liability.

In summary, while individual cases may have achieved the ends of justice , in the process the law as a whole lost clarity, consistency and predictability.

Therefore, the major disadvantage of the current state of the law on occupiers' liability is confusion. As we have seen Nova Scotia has at least six different categories of entrants

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[10] Dauphinee v Canada Life Assurance Co. (1986), 75 N.S.R. 2d 45 (S.C.T.D.)
Malenfant v Shoppers Drug Mart (1990), 96 N.S.R. 2d 226 (S.C.T.D.)

and four or five different standards of care. Within the standard of care owed to invitees and licensees occupiers are liable for "unusual dangers". What is an "unusual danger"? In Nova Scotia water and slippery floors are definitely "unusual dangers"[11] while icy, slippery conditions are generally not.[12]

The Proposal

If one of the policy objectives of the law is to discourage antisocial behaviour it must inform occupiers of their rights and responsibilities. It is difficult to see what understanding an individual would have of this confused state of the law.

The Occupier's of Land Liability Act is too narrow to comfort occupiers and sets too low a standard of care to comfort visitors. Merely repealing and leaving the common law to evolve on its own would be haphazard. Comprehensive legislation appears to be the common sense solution.

What model of legislation should be chosen? There are three types of legislation which have been enacted in other jurisdictions. The first is the most clear cut: an Act which establishes a reasonable duty of care to all entrants. This approach has been adopted in Scotland and British Columbia. The second is a reasonable duty of care with exceptions for categories of entrants such as trespassers, criminals and recreational users, on certain defined premises. The weakness of this is its dependence on categories again.

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[11] Lowry v Kinley Drug Ltd (1987) 74 N.S.R. 2d 122 (S.C.T.D.)
Davidson v Morris Drug Store Ltd (1980) 42 N.S.R. 2d 582 (S.C.T.D.)
Gunn v Halifax County Condominium Corporation # 6 (1985) 67 N.S.R. 2d, 262 (S.C.T.D.)
Boudreau v Halifax Professional Center Ltd. (1981) 49 N.S.R. 2d, 509 (S.C.T.D.)

[12] Vyas v Board of Education (1989) 94 N.S.R. 2d 350 (C.A.)
Pryde v Lindsay Funeral Homes (1986) 71 N.S.R. 2d 169 (S.C.T.D.)
Doucette v Martell and Martell 48 N.S.R. 2d 536 (S.C.T.D.)
Cole v Perrin (1982) 5, 2 N.S.R. 2d 408 (S.C.T.D.)

The third is the English approach of 1984 which extends a reasonable duty of care to all visitors but also provides guidelines for when a duty is owed, codifying many of the "foreseeability" factors cited in Veniot and Herrington such as: knowledge of the likelihood of trespassers being present, knowledge of danger, the nature of the premises, and efforts taken by the occupier to discourage persons from incurring the risk or give warning of the danger. The Manitoba Act adopts this approach. Section 3 of that Act establishes a duty of reasonable care towards all entrants and describes the foreseeability factors as to when that duty is discharged.

The objective is to simplify occupiers' liability in order to afford occupiers and visitors alike greater certainty with respect to their rights and liabilities. The general approach recommended in this paper is to apply to occupiers' liability the reasonable care standard that works so well in the general field of negligence. In this way we will have the benefit of the modern legal concepts of foreseeability, causation, remoteness and contributory negligence, as well as the jurisprudence of other jurisdictions.

More specifically, the recommendations contained in Part II of this paper extend a reasonable standard of care to all entrants and provide the guidelines used in England. Experience in Scotland, England and British Columbia shows that this will not burden occupiers unfairly. Given the opportunity, the Courts (and ordinary people for that matter) balance the foreseeability of the entry, the likelihood of possible injury, and the burden on the occupier of protecting the entrant from danger very well.

The principal argument against this approach is that a trespasser should be owed a lower duty of care because he or she is a "wrongdoer". While this may be true (though it does not consider the case of a child) the right to the exclusive possession of property "should not carry with it the privilege to engage in conduct fraught with the reasonable probability of harm"[13]. As we have seen, a common standard of care does not mean all visitors are treated the same. Wrongful entry is better dealt with by the rules of

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13 Fleming, J., "Tort Liability of Occupier of Land, Duties Owed to Trespassers" (1953) 63 Yale L. J., p. 144 at 146.

apportionment and contributory negligence. Under these rules, the carelessness or wrongdoing of the person injured is balanced against any negligent conduct on the part of the occupier.

It should be remembered, as well, that occupiers of land have other proceedings open to them under the Protection of Property Act R.S.N.S. 1989, c. 363, as well as the right at common law to use reasonable force to eject a trespasser. Nothing in this proposal will affect these rights.

There may be an argument for a lower standard of care towards certain recreational users, such as snowmobilers, in order to encourage landowners to allow the use of their land by others for recreational purposes by reducing the threat of tort liability. Options for adapting the proposal to achieve this policy objective are also discussed in Part II.

In summary, it is the recommendation of this paper that Nova Scotia adopt the English/Manitoba approach by imposing a common duty of reasonable care and establishing criteria of foreseeability which will assist the courts and litigants in determining when the duty attaches and when it has been discharged. This approach avoids the weaknesses inherent in an approach which depends upon defining categories of entrants, while utilizing the criteria of foreseeability which have a proven track record in the courts in the other fields of negligence law.

PART 2: SECTION BY SECTION COMMENTARY ON THE PROPOSED ACT

INTRODUCTION

The provisions of the proposed Act follow existing and proposed occupiers' liability legislation from other provinces including Ontario, Prince Edward Island, Saskatchewan and British Columbia as well as the Uniform Act (1973) drafted by the Commissioners on Uniformity of Legislation in Canada. On issues of great divergence such as the duty of care owed to trespassers, recreational users and those engaged in the commission of a criminal offence, an attempt has been made to accompany the recommendations of this report with a fair representation of the alternative approaches taken in other Canadian jurisdictions.

SECTION 1

Definitions [14]

1. In this Act

(1) "occupier" means an occupier at common law and may include

(a) a person who is in physical possession of premises, or

(b) a person who has responsibility for, and control over, the condition of the premises, the activities conducted on those premises or the persons allowed to enter the premises and for the purposes of this Act there may be more than one occupier of the same premises;

The definition of "occupier" closely follows that found in the Uniform Act (1973) and recognizes that in shopping malls, apartment buildings and areas where an independent contractor is performing work, there may be more than one "occupier" responsible for the activity in, or condition of the premises.[15]

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[14] Recommended sections appear in bold type. Alternative sections appear in ordinary type.

[15] See, for example, Crowe v Dartmouth and Steed and Evans Ltd (1985), 69 N.S.R. 2d 258 (S.C.T.D.)

1 (2) "premises" includes:

(a) land and structures or either of them excepting portable structures and equipment other than those described in clause (d),

(b) water,

(c) ships and vessels,

(d) trailers and portable structures designed or used for a residence, business or shelter,

(e) railway cars, vehicles and aircraft, except while in operation

This section follows closely the Ontario Act (S.O. 1984, c. 322) which contains one of the broadest definitions of "premises". There are two reasons for this. First, because the intention is to standardize and remove uncertainty, leaving gaps around the edges would only create fresh confusion. Second, the duty of care imposed by this Act and the duty under the principles of general negligence law are the same, (the duty of reasonable care), so persons to whom this Act would apply, but who are not "occupiers" under the common law, will be under no greater burden or duty than at present.

SECTION 2

Common Law Rules Abolished

2 The provisions of this Act apply in place of the rules of common law for the purpose of determining the care that an occupier owes persons entering on his or her premises in respect of damages to them or their property.

This section reflects one of the main purposes of the Act which is to abolish the arbitrary distinctions in the standard of care owed by occupiers to "trespassers", "licensees" and "invitees".

While most statutes include both personal injury and damage to property as compensable the Saskatchewan proposal (not yet enacted) explicitly preserves the common law with

respect to damage to property which is not "collateral" to some personal injury. At common law, in Nova Scotia, it is clear that compensation for property damage is not dependant on personal injury, a policy which this proposal adopts.[16]

SECTION 3

Occupiers' Duty

3 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

This section follows s. 3 (1) of the Uniform Act. The duty to take such care as in all the circumstances of the case is reasonable has been adopted in all provincial legislation on the subject (see Occupiers' Liability Acts of British Columbia, Alberta, Manitoba, Ontario and Prince Edward Island). The standard of "reasonable care" is a familiar concept from the general law of negligence.

Like the Uniform Act this section applies to both personal injuries and property damage. Comparable provisions are found in the legislation of British Columbia (s.3), Manitoba (s.3), Ontario (s.3) and Prince Edward Island (s.3).

Application of Duty

3 (2) The duty referred to in subsection (1) applies in respect of

(a) the condition of the premises

(b) activities on the premises; and

(c) the conduct of third parties on the premises

This subsection is similar to the Uniform Act, the B.C. Act (s. 3(2)), the Alberta Act (s.6), the Manitoba, Ontario and P.E.I. Acts (s. 3(2)).

The aim is to make clear, following the common law developments in this area, that an occupier can be liable both for the static conditions of his property as well as any

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16 Watson v Halifax Industries Limited (1982), 52 N.S.R. 2d 451 (S.C.T.D.)
Rogers v Atlantic Sand and Gravel Limited (1979), 35 N.S.R. 2d 576 (S.C.T.D.)

dangerous activities being carried on there, whether or not the risk is a result of the actions of a third party, such as an independent contractor.

> **Factors to be considered**
> **3 (3) Without restricting the generality of subsection (1) in determining whether the duty of care under subsection (1) has been discharged, consideration shall be given to:**
> **(a) the knowledge which the occupier has or ought to have of the likelihood of persons or property being on the premises;**
> **(b) the circumstances of the entry into the premises;**
> **(c) the age of the person entering the premises**
> **(d) the ability of the person entering the premises to appreciate the danger;**
> **(e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk;**
> **(f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.**

The factors listed in this subsection are intended to assist both courts and occupiers in determining what a reasonable duty of care is in any particular circumstance. The application of the duty may differ markedly from one entrant to another. A "common duty of care" does not mean that all entrants, regardless of their reason for being on the premises, will be treated the same. When determining whether the duty has been met the court is required to consider "all the circumstances" of the case (subsection 1), including the factors set out in subsection (3). The subsection is not an exhaustive list. The factors identified, however, have been cited by courts in arriving at their conclusions concerning liability of an occupier.[17] While most other jurisdictions which have legislated a duty of reasonable care towards all entrants have not included similar lists of factors, it is felt that such a list will assist the courts and litigants.

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[17] Veniot v Kerr Addison Mines [1975] 2 S.C.R. 311 at pages 321-323 (judgement of Dickson J.)

So, for example it is clear from section (3) (a) that the foreseeability of the presence of a person on the premises is an important consideration in assigning liability. Thus a snowmobiler travelling in a remote woodlot in Nova Scotia without the knowledge or consent of the occupier will be treated differently than a shopper who suffers injury in a mall. Under s. (3) (b) the circumstances of the entry, whether for criminal or lawful purposes, would have an impact of the Court's decision. A burglar who trips on a broken step while breaking into your home would stand in a very different light than the letter carrier injured in a similar manner while delivering your mail. Similarly, under s. (3) (c) and (d) an occupiers' duty toward a child or disabled person would be different than that owed to a healthy adult. S. 3 (e) recognizes the efforts made by an occupier to warn of the danger or discourage persons from incurring the risk in discharging his or her duty. These are factors ordinary, sensible people would apply. They are simpler and more useful than trying to fit the visitor into a category.

The factors listed deal with a central concern of those who have argued for the retention of a lower duty of care with respect to trespassers: that the presence of trespassers is unpredictable and that in many cases an occupier will have no knowledge of their presence. However, as subsection (3) of the proposed Act makes clear, under the ordinary rules of negligence, the law would not impose liability unless the presence of the entrant on the premises was "reasonably foreseeable".

British Columbia, which has had a legislated common duty of care toward all entrants since 1976, recently considered forseeability. In Kranabetter v the City of Kelowna (1987), 40 C.C.L.T. 292 B.S.S.C. (decision upheld on appeal) the British Columbia Supreme Court considered the care of a midnight swimmer in a municipal park in early April who dove into a shallow lake and was seriously injured. A sign at the entrance of the park stated that the park was closed, but the sign in the area of the dive, warning of the shallowness of the water and danger of diving, had been removed during the off-season. Despite the fact that the occupier knew of the danger and indeed had taken steps to protect summer swimmers from that danger, the court ruled that the presence of a swimmer in April was not reasonably foreseeable and denied liability.

Therefore the extension of a duty of reasonable care towards trespassers does not place an onerous a burden upon occupiers' of land. The duty is only to take reasonable precautions against risk of harm. In any event, the Supreme Court of Canada decision in Veniot v Kerr Addison Mines[18] has probably raised the common law duty to the same level as in this proposal. Therefore the real benefit of this proposal is certainty.

> **Higher Standard of Care**
> **3 (4) Nothing in this section relieves an occupier of premises of any duty to exercise, in a particular case, a higher standard of care which, in that case, is required of the occupier by virtue of any Act or rule of law imposing special standards of care on particular classes of premises.**

This appears in most of the Acts of other jurisdictions dealing with occupiers' liability. In order to ensure that any higher duty owed by an occupier at common law (other than the common law of occupiers' liability) or by virtue of any legislation in a specialized circumstance will continue to apply.

SECTION 4

> **Extension, Restriction or Modification of Duty of Care**
> **4 (1) An occupier may, by express agreement or by express stipulation or notice,**
> **(a) extend or increase the duty referred to in subsection 3 (1); or**
> **(b) restrict, modify or deny the duty referred to in subsection 3 (1) subject to any prohibition or limitation imposed by this or any other Act of the Legislature, against or on, the restriction, modification or denial of the duty.**

Similar provisions are found in other jurisdictions, such as British Columbia (s. 4 (1)), Ontario (s. 5 (1) and (3)), and Manitoba (s. 4 (1). This allows an occupier to modify the duty of care established by section 3 by express agreement, stipulation or notice. However, this right is not absolute (see subsection 4 (2)).

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[18] ibid note

Restriction to be reasonable

4 (2) No restriction, modification or denial of the duty referred to in section 4 (1), whether an agreement, stipulation, or notice, is valid or binding against any person unless in all the circumstances of the case it is reasonable and, without limiting the circumstances to be considered in any case, in determining the reasonableness of any restriction, modification or denial of the duty, the circumstances to be considered shall include

(a) the relationship between the occupier and the person affected by the restriction modification or denial;

(b) the injury or damage suffered and the hazard causing it;

(c) the scope of the purported restriction, modification or denial; and

(d) the steps taken to bring the restriction, modification or denial to the attention of the persons affected thereby.

Similar sections appear in the Manitoba Legislation (s.4 (2)) as well as the Saskatchewan draft legislation. This section requires that all contractual modifications of the duty of care meet the test of "reasonableness" and sets out certain factors aimed at assisting courts and litigants in making this determination.

This section appears to modify the common law, where the ostensible position is that an exclusion or limitation of liability is effective as long as it is brought to the attention of the person affected[19]. However, there are signs that "reasonableness" is being used now by the courts in dealing with exclusionary clauses in situations where there is an inequality of bargaining power or where one of these clauses forms part of a ticket of admission and "freedom of contract" is largely a fiction.

Examples of how this would work are provided in the 1977 study paper produced by the Nova Scotia Law Reform Advisory Commission:

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[19] Knickle v Silver Garage Limited (1971) 4 N.S.R. 2d 681 N.S.T.D.

> ... if a parking lot has notices reading "Not responsible for any damage", that notice, even if sufficiently brought to the attention of the entrant, may be considered unreasonable. Compare the following two cases. In the first, a motorist leaves the key is his car on the occupier's parking lot at the lot attendant's request. The lot attendant decided to go home for lunch, and the car is stolen. In the second case, the key is left with the attendant, but thieves break into the locked car and steal the motorist's camera. The attendant is at his post but makes no attempt to survey the lot. The exculpatory notice would be reasonable under all the circumstances in the second case but not the first. In the first case the motorist has been requested to keep the car unlocked and has been given no warning that the attendant will not remain at his post to control the entrance and egress of cars. In the second, the notice is sufficient to warn the motorist that the attendant will not necessarily be watching the car for thieves. The subsection would permit the court to look at the overall fairness of the exculpatory notices and contractual terms in the light of the entire situation, without attempting to evade the issue by, for example, reclassifying a license as a bailment."

Courts in Nova Scotia have relied on rules of strict construction in concluding that an exclusionary clause in a commercial lease was not binding on a tenant.[20] Another approach has been to find that a sign excluding liability was not brought to the attention of the plaintiff.[21] Clearly the courts have been unwilling to automatically give effect to disclaimers of liability contained in such notices. Therefore subsection 4 (2) is not the departure from the current situation it initially appears to be.

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20 Boudreau v Halifax Prof. Ctr. Ltd. (1981), 49 N.S.R. 2d 509 (S.C.T.D.)

21 Watson v Halifax Industries Limited (1982), 52 N. S. R. 2d 451 (S. C. T. D.)

Notice of restriction

4 (3) Subject to subsections (4) and (5), where an occupier restricts, modifies or denies the duty referred to in subsection 3 (1), the occupier shall take reasonable steps to bring the restriction, modification or denial to the attention of the person to whom the duty is owed.

This requires reasonable steps to bring a limitation to the attention of the person affected. In this sense it resembles the common law as stated in Watson v Hfx Industries Ltd. where the court found that a single sign containing a disclaimer clause in a parking lot did not adequately bring to the plaintiff's attention the exclusionary clause being relied on by the defendant.

Entrants as of Right

4 (4) An occupier of premises shall not restrict, modify or deny the duty referred to in subsection 3 (1) with respect to a person who is empowered or permitted under the law to enter or use the premises without the consent or permission of the occupier.

This section refers to officials who have a right to enter property such as police officers , firefighters, assessors and the like, and provides that they are not subject to any exclusions or limitations of liability regardless of notice.

Existing Agreements

4 (5)

This section applies to express agreements in force at the proclamation of this section as well as to those entered into on or after that date.

The Act applies to contracts entered into before the Act was passed as well as after. As the Saskatchewan Law Reform Commission noted "there appears to be no reason why contracts which may have been entered into in the past and which may run for extensive periods of time should escape the application of the law."[22]

> Voidable Conditions
> Conditions contained in notices and in tickets, programmes and similar documents of admission which restrict, modify or exclude the occupiers' duty of care to the extent that breach of that duty results in death or injury are null and void.

This section is not recommended. Under the proposed approach, the courts, in determining the effectiveness of exclusionary clauses, must consider whether the persons affected have received actual notice of the limitation or liability claimed and the "reasonableness" of the limitation as described by the factors at subsection 4 (2). If this subsection were enacted it would void any agreement which is contained in an "unnegotiated agreement" (such as notices, tickets or other documents of admission), regardless of its reasonableness, if death or injury occurs. Similar sections are contained in the Saskatchewan draft legislation. However, there does not appear to be any rational basis for restricting freedom of contract according to the nature of the harm suffered (as opposed to the reasonableness of the restriction, the duty of care, or the degree of negligence), something that can only be known after the fact.

SECTION 5

> **Damage caused by Independent Contractor**
> **5 (1) Notwithstanding subsection 3 (1), where damage is caused to persons or property on premises solely by the negligence of an independent contractor engaged by the occupier of the premises, the occupier is not on that account liable under this Act if, in all the circumstances,**

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[22] Tentative Proposals for an Occupiers' Liability Act, Law Reform Commission of Saskatchewan, Saskatoon, Saskatchewan, June 1980, at page 55.

(a) the occupier exercised reasonable care in the selection and supervision of the independent contractor; and

(b) it was reasonable that the work that the independent contractor was engaged to do should have been done.

This section establishes the circumstances under which an occupier would not be liable for the negligent conduct of an independent contractor hired by him or her.

First, the occupier must exercise reasonable care in selecting a competent contractor and in supervising the contractor's work. Cases have shown that the level of supervision will vary depending upon the nature of the work being performed

Second, the occupier must show that the work was reasonable. This second element is aimed at extra-hazardous activities which are themselves a tort and prevents an occupier from escaping liability for such acts merely because he or she delegated them to an independent contractor.

Liability imposed under other Acts

5 (2) Subsection (1) does not restrict, modify or deny the liability imposed by any other Act of the Legislature on an occupier of premises for the negligence of independent contractors engaged by the occupier.

This section is similar to those contained in the British Columbia Act, the Ontario Act (s. 6 (3)) and the Alberta Act (s. 11 (2)). The aim of the section is simply to clarify that the Act has no effect on any other statute which imposes or limits the liability of an occupier for the acts of an independent contractor.

Application of subsection (1) where more than one occupier

5 (3) Where damage is caused to persons or property on premises by the negligence of an independent contractor engaged by an occupier of

the premises, and there are two or more occupiers of those premises, each of those occupiers may rely on subsection (1).

Similar to the Uniform Act, this section reflects the position that an occupier should be able to rely on a delegation of the duties set out in subsection 1 to another occupier in order to limit the former's responsibility for tortuous acts of an independent contractor.

SECTION 6

Duty of care of landlord

6 (1) Where under a lease of premises a landlord is responsible for the maintenance or repair of the premises, the landlord owes the same duty to persons entering on the premises and to any person, whether on or off the premises, as is owed by the occupier of the premises.

This section provides a visitor to a rental property with an independent right of action against the landlord if the landlord is responsible for maintenance of the premises. Traditionally, at common law a landlord is under no duty of care to any person lawfully on the premises, other than the tenant, for breach of a covenant to repair.

The conventional remedy for a visitor who is injured as a result of the landlord's breach of a duty to repair is to sue the tenant who then sues the landlord. This section will avoid this circuitous route. There are indications that this may already be accepted practice here in Nova Scotia where courts have entertained claims against landlords by non-tenants.[23] This section is similar to section 6 of the Uniform and British Columbia Acts as well as the Ontario Act (s. 8), the Saskatchewan proposal (s. 3 (1)) as well as s. 6 of the Manitoba statute.

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[23] see Graves v Baxter (1988), 89 N. S. R. 2d 19 (S. C. T. D.) and Lindstrom v Bassett Realty Ltd (1978), 28 N. S. R. 2d 616, S.C.T.D. (varied in part and affirmed on appeal)

The operative consideration is whether the "landlord" had control over the premises. Under the Residential Tenancies Act (R.S.N.S. 1989, c. 401) the covenant to repair is an implied term of every residential lease.

> **Application to subleases**
> **6 (2) Where premises are sublet, subsection (1) applies to any landlord who is responsible for the maintenance and repair of the premises.**

This section clarifies the application of subsection (1) to subtenants.

> Default must be actionable by occupier
> For the purposes of this section, a landlord of premises is not in default of the duty described in subsection (1) unless the default is such as to be actionable at the suit of the occupier of the premises.

This section is not recommended but it appears in the Ontario Legislation, and is copied from section 6 (3) of the Manitoba Act. It is absent from similar legislation affecting landlords and tenants in England and Scotland. Under this section a third party is still dependent for his or her cause of action on whether the tenant gave actual notice to the landlord in a reasonable time to make the premises safe. In its absence, the liability of a landlord at the suit of a third party would depend upon whether the landlord knew or should have known of the defect which caused the damage or injury.

> **No restriction on other duties**
> **6 (3) Nothing in this Act relieves a landlord of any duty imposed on landlords under any other Act or law.**

This section states that a landlord remains bound by any other duties imposed on him or her by statute at the common law.

Application to statutory leases, etc.

6 (4) For the purposes of this section, obligations imposed on a landlord by any Act or law shall be deemed to be imposed under the lease and "lease" includes any statutory lease or any contract or statutory provision conferring the right of occupation of premises on a person who is not the owner thereof and "landlord" shall be construed accordingly.

Under this section, the duty of reasonable care in this Act as well as any other obligations contained in other Acts become an implied term in any lease, statutory or otherwise, overriding any provisions in the lease to the contrary.

Existing leases

6 (5) This section applies to leases in force at the proclamation of this section as well as to leases entered into, on or after that date.

The Act applies to all leases. As with contracts containing exclusionary clauses it is difficult to see why leases operating over a lengthy period should be exempt from the provisions of this Act.

SECTION 7

Application of Tortfeasors and Contributory Negligence Acts

7 The Contributory Negligence Act and the Tortfeasors Act apply to and in respect of damages arising from a breach of the duties imposed under this Act.

There shall be contribution among the tortfeasors where more than one occupier is at fault and apportionment, where a plaintiff is partially to blame for the loss or injury under the provisions of the Contributory Negligence Act (R.S.N.S. 1989, c. 95.)

SECTION 8

Crown bound.

8 (1) Subject to subsection (2), the Crown is bound by this Act.

The Act binds the Crown in right of the Province and the Proceedings Against the Crown Act (R.S.N.S. 1989, c. 360) applies, as it does to common law negligence.

Exceptions for Crown

8 (2) Sections 3, 4, 5 and 6 do not apply to the Crown where the Crown is the occupier

(a) of a public highway or a public road; or

(b) of drainage works; or

(c) of a river, stream, watercourse, lake or other body of water except those areas thereof that have been specially developed by the Crown for recreational swimming or for the launching and landing of boats.

The rationale for this section is that crown liability for these premises is provided in other legislation.

SECTION 9

Exemption for Municipalities

9 (1) Sections 3, 4, 5, 6 and 7 do not apply to a municipality where the municipality is the occupier of a public highway, public road, public walkway or sidewalk.

General exceptions

9 (2) Sections 3, 4, 5 and 6 do not apply to or affect

(a) the liability or duties of an employer to employees of the employer;

(b) the liability or duties of any person arising under a contract for the hire of, or for the carriage for reward of persons or property in any vehicle, vessel, aircraft or other means of transportation;

(c) the liability or duties of any person under the Innkeepers Act ; or

(d) the liability or duties of any person by virtue of a bailment.

(e) the liabilities or duties of any person under the Trails Act.

The objective of the Act is not to disturb any statute or law which imposes a specialized standard of care upon an occupier. It preserves specific rules of bailment, innkeepers, common carriers, rental of transportation, public trails and the common law of master and servant. In particular, it does not disturb the lower standard of care owed by occupiers towards users of trails under the Trails Act (R.S.N.S. 1989, c. 476).

SECTION 10

Transitional

10 (1) Subject to subsections 4 (5) and 6 (5) this Act applies only in respect of a cause of action arising after the coming into force of this Act.

Similar provisions appear in most other legislation. The two exceptions provided for are contracts and leases entered into prior to the effective date of the Act.

Act Repealed

10 (2) The Occupiers' of Land Liability Act is repealed.

It is recommended that the current Occupiers' of Land Liability Act (R.S.N.S. 1989, c. 322 be repealed. It could be replaced by a section in the proposed Act (see "Lower Standard of Care") although this is not recommended.

Lower Standard of Care

This part contains a discussion of various provisions which afford occupiers a lower standard of care with respect to designated entrants. These provisions achieve a result similar to that of the present Occupiers' Liability Act and Trails Act in that they reduce the standard of care owed to various recreational users and other categories of entrants.

While there may be good policy reasons for reducing the standard of care owed to designated recreational users (such as those who have paid no entrance fee) in order to encourage landowners to make their property accessible, it is considered that the duty of care should be left to the court's consideration in individual cases relying on the factors noted in subsection 3 (3) rather than imposing arbitrary exceptions.[24]

Similarly, in respect of other entrants, such as trespassers and criminals, any exclusion of liability should take place through a reasoned analysis of "all the circumstances" of the case, including the factors noted in section 3 (3) in order to achieve fair and predictable outcomes.

If, however, it is determined that a lower standard ought to be legislated, there are several options.

The first alternative is predicated upon the notion that off-road vehicles are inherently dangerous and their drivers accept legal responsibility for their mishaps.

> Duty of Care Respecting Off-Road Vehicles
> Notwithstanding subsection (1), an occupier of premises owes no duty of care towards a person who is driving or riding an off-road vehicle or is being towed by an off-road vehicle or is riding on or in a conveyance being towed by an off-road vehicle on the premises without the express or implied consent of the occupier, except the duty
>
> (a) not to create a danger with deliberate intent of doing harm or damage to the person or person's property; and
>
> (b) not to act with reckless disregard of the presence of the person or the person's property.

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[24] Regardless of this view however, it is not the intention of this proposal to interfere with the provisions of the Trails Act (R.S.N.S. 1989, c. 476)(see s. 10 (2) (e)).

This subsection is taken from the Manitoba Act (LRM 1987 c. 08, s. - 3 (4)) and has a similar intention to the present Nova Scotia Occupiers' Land Liability Act. It is preferable to the Nova Scotia Act because: it does not rely on the common law categories of licensee and trespasser; restricts the lower standard of care to those without permission; and raises the standard to include "reckless disregard." However, it makes no distinction between children and adults, or innocent and malevolent intruders. It is recommended that this section not be included. The factors enumerated in subsection 3 (3) will protect occupiers from claims by intruders whether motorized or not.

A second alternative pertains to all risks assumed by the visitor not just motorized vehicles.

> Assumption of Risk
> An occupier of premises owes no duty of care to a person entering on the premises or whose property is on the premises in respect of any risks willingly assumed by that person.

Similar sections appear in most occupiers' liability legislation. In Canada, however, they have received a number of different interpretations and may be less comforting to occupiers than first appears. The Ontario Court of Appeal recently concluded that a comparable subsection of the Ontario Act merely preserves the defence of *volenti non fit injuri*[25] . The Court stated that, in order to succeed using a *volenti* defence, the occupier must show that the visitor not only knew of the physical risk of harm, but also knew of and waived his or her right of action for negligence. Thus the visitor must be shown to have assumed both the physical and legal risk of injury. This is extremely difficult.

However other courts indicate that it may be sufficient under this subsection for a defendant to show that the plaintiff recognized and appreciated the nature of the danger and that a positive waiver of legal rights is not necessary.[26] Certainly this has been the common law interpretation of the *volenti* doctrine by the Nova Scotia courts.[27]

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[25] Waldick v. Malcolm, (1989) 70 O. R. 717

[26] Jamis v Vancouver (1989), B.C.J. 1347 B.C.C.A.

[27] Crowe v Dartmouth and Steed and Evans Ltd. (1985), 69 N. S. R. 2d 258 (S. C. T. D.)

Voluntary Assumption of Risk

(1) The duty of care provided for in subsection 3 (1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his property and to not act with reckless disregard at the presence of the person or his property.

Criminal Activity

(2) A person who is on premises with the intention of committing, or in the commission of, a criminal act shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1).

Trespass and Permitted Recreational Activity

(3) A person who enters premises described in subsection (4) shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1),

(a) where the entry is prohibited by notice under the Protection of Property Act.

(b) where the occupier has posted no notice in respect of entry and has not otherwise expressly permitted entry; or

(c) where the entry is for the purpose of a recreational activity and,

  (i) no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association, and

  (ii) the person is not being provided with living accommodation by the occupier.

Premises Defined

(4) The premises referred to in subsection (3) are,

(a) a rural premises that is,

(i) used for agricultural purposes, including land under cultivation, orchards, pastures, woodlots and farm ponds,

(ii) vacant or undeveloped premises,

(iii) forested or wilderness premises;

(b) golf courses when not open for playing;

(c) utility rights-of-way and corridors, excluding structures located thereon;

(d) unopened road allowances;

(e) private roads reasonably marked by notice as such; and

(f) recreational trails as defined by the Trails Act reasonably marked by notice as such.

This section first appeared in the Ontario Act and was later included in the legislation passed in Prince Edward Island. The object of the section, while restating the *volenti* defence discussed in the previous section, is to create a category of wrongdoers (trespassers and criminals) and recreational users to whom a lower duty of care is owed. Liability is based on intentional harm or "reckless disregard", the standard at common law with regard to trespassers prior to Herrington.

In relation to recreational users, this section is reminiscent of section 18 of the Trails Act (R. S. N. S. 1989, c. 476) which provides that the owner or occupier of land owes no duty of care towards a person using his or her land whether that person is actually on the trail or not, but it does not require that the premises be designated as such. Clearly the argument in favour of such an exception to the duty of reasonable care recognizes the desirability of encouraging landowners to make their land available to hikers and skiers by reducing their liability for negligence. This argument must be balanced against the social utility of holding persons reasonably responsible for negligent conduct which causes injury or damage.

Volenti works as a total bar to recovery. Critics argue that it was conceived before the rules of contributory negligence and apportionment legislation had been devised. They argue that today an "all or nothing" defence is no longer necessary and draconian in its effect. In addition, as will be seen from section 4, it is open to an occupier to modify the duty owed to entrants by agreement, to an extent. For this reason it is recommended that a *volenti* provision not be included.

Should a *volenti* provision be included it is recommended that it clearly state whether it incorporates the common law with respect to the defence or not in order to aid in future judicial interpretation (namely whether that it requires a waiver of physical risks as well as legal rights or not).

A reasoned approach, it is submitted, as appears at subsections 3 (1) and (3), would not add unreasonably to an occupiers' burden of liability. Should a reduced standard of care be adopted, it is submitted that such a standard should include both intention and reckless disregard.

SUMMARY

The legislation proposed in this discussion paper would replace the current reliance on arcane categories of visitor with a standard of care that is reasonable in the circumstances of the visit. It would provide factors that are to be considered when determining the reasonableness of the care taken by an occupier and the behaviour of a visitor. The standard of reasonable care applies in other areas of tort law and works well. It is more easily understood by lawyers and lay persons than the categories of trespasser, licensee and invitee. It applies common sense instead of technicalities.

[1] Report on Occupiers' Liability, Ontario Law Reform Commission, Ontario Department of Justice, 1972, page 6

[2] Dunster v Abbott [1953] 2 All E.R. (C.A.) 1572, 1574

[3] supra note 1 at page 6

[4] Occupiers' Liability Act 1984, c. 3, s. 1 (4) (England)

[5] ibid s. 1 (3) (a)

[6] ibid s. 1 (5)

[7] R.S.N.S. 1989, c. 322

[8] McLeod v Bridge Park Ltd (1979), 35 NSR 2d 169 (S.C.T.D.)

[9] Hertz, Michael Terry, N.S.L.R. Advisory Commission, "Occupiers' Liability Law: A Study Paper", (1976) at p. 6.

[1] Dauphinee v Canada Life Assurance Co. (1986), 75 N.S.R. 2d 45 (S.C.T.D.)
Malenfant v Shoppers Drug Mart (1990), 96 N.S.R. 2d 226 (S.C.T.D.)

[11] Lowry v Kinley Drug Ltd (1987) 74 N.S.R. 2d 122 (S.C.T.D.)
Davidson v Morris Drug Store Ltd (1980) 42 N.S.R. 2d 582 (S.C.T.D.)
Gunn v Halifax County Condominium Corporation # 6 (1985) 67 N.S.R. 2d, 262 (S.C.T.D.)
Boudreau v Halifax Professional Center Ltd. (1981) 49 N.S.R. 2d, 509 (S.C.T.D.)

[12] Vyas v Board of Education (1989) 94 N.S.R. 2d 350 (C.A.)
Pryde v Lindsay Funeral Homes (1986) 71 N.S.R. 2d 169 (S.C.T.D.)
Doucette v Martell and Martell 48 N.S.R. 2d 536 (S.C.T.D.)
Cole v Perrin (1982) 5, 2 N.S.R. 2d 408 (S.C.T.D.)

[13] Fleming, J., "Tort Liability of Occupier of Land, Duties Owed to Trespassers" (1953) 63 Yale L. J., p. 144 at 146.

[14] Recommended sections appear in bold type. Alternative sections appear in ordinary type.

[15] See, for example, Crowe v Dartmouth and Steed and Evans Ltd (1985), 69 N.S.R. 2d 258 (S.C.T.D.)

[16] Watson v Halifax Industries Limited (1982), 52 N.S.R. 2d 451 (S.C.T.D.)
Rogers v Atlantic Sand and Gravel Limited (1979), 35 N.S.R. 2d 576 (S.C.T.D.)

[17] Veniot v Kerr Addison Mines [1975] 2 S.C.R. 311 at pages 321-323 (judgement of Dickson J.)

[18] ibid note

[19] Knickle v Silver Garage Limited (1971) 4 N.S.R. 2d 681 N.S.T.D.

[20] Boudreau v Halifax Prof. Ctr. Ltd. (1981), 49 N.S.R. 2d 509 (S.C.T.D.)

[21] Watson v Halifax Industries Limited (1982), 52 N. S. R. 2d 451 (S. C. T. D.)

[22] Tentative Proposals for an Occupiers' Liability Act, Law Reform Commission of Saskatchewan, Saskatoon, Saskatchewan, June 1980, at page 55.

[23] see Graves v Baxter (1988), 89 N. S. R. 2d 19 (S. C. T. D.) and Lindstrom v Bassett Realty Ltd (1978), 28 N. S. R. 2d 616, S.C.T.D. (varied in part and affirmed on appeal)

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[25] Waldick v. Malcolm, (1989) 70 O. R. 717

[26] Jamis v Vancouver (1989), B.C.J. 1347 B.C.C.A.

[27] Crowe v Dartmouth and Steed and Evans Ltd. (1985), 69 N. S. R. 2d 258 (S. C. T. D.)